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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VERMONT CASTINGS, INC.,
Petitioner,
v.
GREGGAR S. ISAKSEN
d/b/a APPLEWOOD STOVE WORKS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

In this case, a dealer alleges that he was an unwilling co-conspirator in a price-fixing scheme with a manufacturer-supplier in violation of section one of the Sherman Act, 15 U.S.C. § 1. The question presented is whether the dealer presented sufficient evidence of a meeting of the minds in an unlawful agreement to withstand a directed verdict when the dealer raised his prices to the suggested level for a four-month period a year after the only evidence that could be construed as a coercive threat, but never informed the manufacturer he was doing so and presented no evidence that the manufacturer knew of his actions.

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The petitioner, Vermont Castings, Inc.,[1] respectfully prays that a writ of ceriorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this case on August 4, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 825 F.2d 1158 and appears in the Appendix hereto. The opinion of the United States District Court for the Western District of Wisconsin (Shabaz, D.J.) granting Vermont Castings' motion for judgement n.o.v. is reported at 644 F. Supp. 1098 and also appears in the Appendix.

[1]Pursuant to Rule 28.1 of the Supreme Court Rules, Vermont Castings, Inc. represents that it hs no parent company, subsidiaries or affiliates.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1987. No rehearing was sought. This Petition for Writ of Certiorari was filed within ninety days after entry of judgment in the court of appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

STATEMENT OF THE CASE

Petitioner Vermont Castings, Inc., a Vermont corporation, is a manufacturer of woodburning stoves. Respondent Greggar S. Isaksen, d/b/a Applewood Stove Works, a Wisconsin resident, has been an authorized dealer of Vermont Castings stoves since 1982. Isaksen brought this action against Vermont Castings in district court for the Western District of Wisconsin on September 17, 1985. His complaint alleged violations of the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Wisconsin Fair Dealership Law, and asserted a common law libel claim. Jurisdiction of the court was based upon 15 U.S.C. § 4 and 28 U.S.C. §§ 1332 and 1337.

Vermont Castings was granted partial summary judgment on the state law claims and the case proceeded to trial on Isaksen's federal antitrust claims. At trial, Isaksen pursued two theories involving his discount pricing policies. The first was that Vermont Castings had taken steps to injure his business in response to complaints from other dealers about Isaksen's low prices and in furtherance of an unlawful price-fixing agreement between Vermont Castings and its other dealers. The second theory was that Vermont Castings pressured Isaksen to raise his prices and he reluctantly complied

for approximately the last four months of 1983, making him an unwilling co-conspirator with the company in an illegal price-fixing scheme.

This petition involves only the second claim. The evidence at trial regarding this claim can be summarized as follows.

Vermont Castings was founded in 1975. (Tr. 3A, p. 21).[2] At first, the company sold its woodburning stoves through its foundry in Randolph, Vermont. Its direct sales were gradually augmented by sales through a handful of dealers. (Tr. 3A, p. 22.) In 1982, as demand for the stoves slackened, the company began to build a more extensive distribution base to make its products more convenient to purchase. (Tr. 3A, p. 25.) Vermont Castings eventually moved to an increasing dependence on sales through dealers, and in 1986 announced it was withdrawing from the direct sale business entirely. (Tr. 1A, p. 70; 3A, p. 74.)

The company's first Wisconsin dealer was appointed in 1981. (Tr. 1A, p. 74.) Isaksen and a dealer in Green Bay, Wisconsin were the second and third Vermont Castings dealers in the state, both appointed February 1, 1982. (Tr. 1A, pp. 73-74, 106.) In March, 1982, the company appointed Thomas Bowditch a dealer in Janesville, Wisconsin. (Tr. 1A, p. 74.) Vermont Castings had six Wisconsin dealers by the end of 1982 and ten by the end of 1985. (*Id.*)

Isaksen has operated a retail and sometimes wholesale woodburning stove business under the name Applewood Stove Works since 1975. (Tr. 1A, pp. 69, 80.) Applewood is located in a pole building adjacent to Mr. Isaksen's home in rural Poynette, Wisconsin, about 22 miles north of the City of Madison. (Tr. 1A, pp. 78-79, 81.)

Isaksen has employed a marketing strategy that features his low prices. He has usually sold Vermont Castings stoves at less than the suggested retail price established by the company. (Tr. 1A, p. 74) Vermont Castings' pricing literature has always included sug-

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[2]References are to the volume and page of the trial transcript and to trial exhibits.

gested retail prices, but has consistently stated that dealers are free to charge whatever prices they wish for Vermont Castings products. (Exs. 3(c), 3(f), 3(p)) Nevertheless, Isaksen's pricing practices have prompted numerous complaints from other Vermont Castings dealers to the company and at least one complaint from another dealer directly to Isaksen. (Tr. 1A, p. 74; 2A, pp. 49-50)

In March 1982, Isaksen attended a three or four days of Vermont Castings dealer training in Vermont. (Tr. 1A, pp. 100-01) Isaksen testified that during that trip Stephen Morris, Vermont Castings' Director of Retail Sales, asked him how he arrived at his prices. (Tr. 1A, p. 102) He explained he charged the same as the company was charging in its showroom in Vermont. Morris responded that "it was kind of an oddball way to price things." (Tr. 1A, p. 103)

Later in the Spring of 1982, Morris visited Isaksen at his place of business. (Tr. 3A, p. 33) He tried to visit all Vermont Castings dealers after they were appointed to make sure that company materials were being used properly. (Tr. 3A, p. 35) By the time of this visit, Morris had received complaints about Isaksen from other Wisconsin dealers. (Tr. 3A, p. 112) Morris had told them that he would make sure that Isaksen understood the company's factory pricing, since they complained that Isaksen was charging the factory price and not taking into account the fact that a Wisconsin customer ordering a stove directly from the company would have to pay the cost of shipping the stove from Vermont. (Tr. 3A, pp. 112-13)

Isaksen recounted at trial what he recalled Morris told him during this meeting:

> "Gregg, I'm no longer concerned about the dealer complaints about your prices. . . . I'm now more concerned about the effect you're having on our factory direct sales. . . . We need those factory direct sales in order to earn the money to pay for the advertising programs, to run the plant, and pay the staff. . . . Your prices are the same as ours, and we want you at the higher dealer

> recommended level. We want that factory direct business."
> (Tr. 1A, p. 129)

Morris' testimony regarding this meeting was that at the beginning Isaksen "came on like gangbusters" about how he wouldn't discuss pricing, but he then calmed down. Morris discussed what he thought were some "strange pricing irregularities" on the part of Isaksen (black stoves were priced very low and enamel stoves very high) and they talked about the company's direct business and what Morris thought the benefits of it were. (Tr. 3A, pp. 34-37)

According to Isaksen, he had another conversation with Morris about pricing during the first two weeks of September, 1982. According to Isaksen's account, "During the course of the conversation he [Morris] told me that if I didn't get my prices in order, my orders would be mixed up. . . ." (Tr. 1A, p. 130)

Isaksen admitted that Vermont Castings never mixed up his orders. (Tr. 1A, p. 130) Indeed, he testified that the company "has always done an excellent job of changing orders at any time, any request I have ever had, been very courteous in trying to help the dealer be as profitable as possible." (Tr. 1B, p. 85)

Vermont Castings has engaged in promotional mailings on behalf of its dealers. For the purposes of those promotions, areas have been assigned to dealers on the basis of the first three digits of zip codes. (Tr. 1A, p. 72) The Fall, 1982 promotion listed all Wisconsin Vermont Castings dealers in those mailings sent to Wisconsin residents. (Tr. 1A, p. 122)

For purposes of apportioning the costs of this mailing, Isaksen was assigned the areas covered by zip codes beginning 539, 546 and 537. (Tr. 1A, pp. 120-21) The 539 area included his Poynette location, the 546 area included LaCrosse, Wisconsin and the 537 area consisted of the City of Madison. (See Ex. 1(i)) Isaksen complained that he rather than Bowditch should have been assigned the 535 zip code area, which encompassed Janesville, the location of Bowditch's store, and extended northward to include the area surrounding Madison, stopping just south of Isaksen's Poynette store. (Tr. 1A, p. 121) Isaksen was told that the only effect of assign-

ing the 535 area to him would be to increase his costs. (Tr. 1A, pp. 121-22)

During December, 1982, Vermont Castings planned another promotional mailing for the coming winter months. This promotion offered $75 worth of free accessories with the purchase of a stove. (Ex. 3(j)) The same zip code assignments were made to dealers, but the mailing was designed to list only one dealer, the one to whom the particular zip code of the recipient of the mailing was assigned. (Tr. 1A, p. 124) Isaksen testified that Morris told him this change was made because other dealers in Wisconsin were complaining about Isaksen's prices and a listing of all Wisconsin dealers promoted comparison shopping by customers. (Tr. 1A, p. 125)

Again, Isaksen complained about not receiving zip code area 535. A number of conversations between Isaksen and Morris followed, but the difficulty the Company would have in dividing the 535 zip code area between Bowditch and Isaksen presented problems. (Tr. 1A, pp. 125-26) Ultimately, on January 17, 1983, Isaksen sent back to Vermont Castings the form dealers were to sign to indicate their agreement to participate in the promotion. Isaksen wrote: "I do not wish to participate in the 1983 Vermont Castings Winter Promotion, as we do not wish to project any "sales" image." (Ex. 1(m); Tr. 1A, pp. 126-27)

Morris and Isaksen had further communication in January, 1983. Isaksen testified that they talked only about the Winter, 1983 promotion. (Tr. 1B, p. 89) Morris testified that "a very angry Mr. Isaksen . . . told me in very uncertain terms [sic] that he didn't want to participate in any joint promotions and that basically he wanted to be left free to pursue his own promotional efforts." (Tr. 3A, p. 47) On February 3, 1983, Morris wrote to Isaksen: "We are in receipt of your note declining participation in our Winter Promotion program. Accordingly we have stopped the mailing planned for your territory and will delete your name from referral lists where possible. I am sorry the plan was not to your liking." (Ex. 1(o); Tr. 3A, p. 139)

Following Morris' February 3 letter, Isaksen's name was remov-

ed from dealer lists for Vermont Castings promotional listings, but was maintained on phone referral lists and in the list of dealers contained in the company's Owners' News, a publication sent as a public relations vehicle to the owners of Vermont Castings stoves. (Tr. 3A, pp. 50-51, 90) Accordingly, Isaksen's Applewood stove was listed in Spring, 1983 and July, 1983 Owners' News (though not in the October, 1983 issue). (Tr. 1A, pp. 131-32, Ex. 9(d))

Applewood was not included in a mailing sent in July, 1983, which promoted an $85 savings offer on Vermont Castings stoves. (Ex. 7(c), Tr. 1A, p. 132) Isaksen received a copy of the July promotional mailing, noticed Applewood was not listed, but took no action at that time. (Tr. 1A, p. 133)

Isaksen made some changes in his operation for the 1983 selling season. He scheduled a major television advertisement campaign for the Fall of the year and added an 800 WATS line. (Tr. 1A, p. 133) Isaksen also decided to raise his prices to the suggested dealer level, testifying that he "had gotten the message." (*Id.*) He explained:

> "And so when I had to make my plans, I had a major TV campaign ready to go. I had an 800 number just put; very expensive, both of them. And I had to change my price sheets to get ready for the fall. And I said, 'I'm going to go all the way to the fullest, and I am going to be a good boy, and I hope I get my contract renewed.' "

(Tr. 1A, p. 134) From September 6, 1983 until the end of the year, he charged suggested dealer prices, with occasional discounts. (Tr. 1A, pp. 139-40) In January, 1984, he resumed his discounting policy, a practice he continued through the time of trial. (Tr. 1B, p. 42)

No one from Vermont Castings has ever told Isaksen that if he did not raise his prices he would be terminated. (Tr. 1B, p. 95) Isaksen did not tell anyone from Vermont Castings that he was raising his prices, and no evidence was presented that Vermont Castings knew what Isaksen's prices were during this period. (Tr. 1B, p.

95; 3A, pp. 59-60)

The company did not change the manner in which they dealt with Isaksen during the time he was charging the suggested retail prices. (Tr. 1B, p. 95) Indeed, on Sunday, September 25, 1983, Vermont Castings placed major ads in the Milwaukee Journal and Wisconsin State Journal (published in Madison), inviting inquiries from readers for information about the nearest Vermont Castings dealers. (Ex. 6(b), Tr. 1A, pp. 134-35) No one responding to these ads were referred to Isaksen. (Tr. 3A, p. 116)

Both of Isaksen's antitrust theories were presented to the jury in what amounted to a general verdict form. The jury found for Isaksen and awarded untrebled damages of $100,000.

The trial court subsequently granted Vermont Castings' motion for judgment notwithstanding the verdict. The court relied on *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), to rule that there was insufficient evidence to support Isaksen's claim of a price-fixing conspiracy between Vermont Castings and its other dealers. The court also relied on *Monsanto* to conclude that the jury had insufficient evidence to find that Isaksen was an unwilling co-conspirator in a price-fixing scheme.

Footnote 9 in *Monsanto* states:

> The concept of a "meeting of minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

According to the court,

> When it is at least debatable that a manufacturer does not mean to demand compliance with a suggested price, and plaintiff must admit that it is debatable here, the Supreme Court's requirement of a communicated ac-

> quiescence must be read literally to avoid the risk that a conspiracy will be inferred where none exists. It is not asking too much of an antitrust plaintiff to comply with this dictate since the proof of a conspiracy will be entirely within his power to produce in the circumstances illustrated by this case. [p. 17a, *infra*]

Since it was undisputed that Isaksen never told Vermont Castings he was charging the suggested retail prices during the last four months of 1983, the court ruled his unwilling co-conspirator claim failed as a matter of law.

While commenting "This is a rather sorry excuse for an antitrust case" (p. 2a, *infra*), the court of appeals nevertheless reversed the trial court's ruling on the unwilling co-conspirator claim. The court stated that footnote 9 in *Monsanto* cannot be read literally as requiring a dealer explicitly to communicate his acquiescence to his manufacturer's pricing wishes.

The court concluded:

> [T]he motives for the dealer's adhering to a suggested list price are irrelevant. If (but only if) he agrees to adhere (having been asked to), there is an agreement, no matter how unwilling he is; but it does not follow that his agreement to adhere can never be implicit, or signified by conduct in lieu of promissory language. [p. 8a, *infra*]

The case was remanded to the district court for a new trial on damages and for a ruling on Vermont Castings' motion for a new trial.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the court of appeals' interpretation of the presently unsettled "unwilling co-conspirator" doc-

trine permits the indirect evisceration of the Court's holding in *Monsanto*. Despite clear language to the contrary in *Monsanto*, the court of appeals decision holds that a dealer can establish an "unwilling co-conspirator" antitrust violation simply by testifying that he charged suggested retail prices in response to what he perceived to be pressure from his manufacturer.

This allows disgruntled dealers to avoid the evidentiary standards established in *Monsanto* by claiming they were unwilling co-conspirators and so can take advantage of the far more tolerant proof requirements established by the court of appeals. This result threatens the same beneficial aspects of restrictive methods of distribution that the Court sought to protect in *Monsanto* and creates substantial but unforeseeable dangers of treble damage liability for manufacturers seeking to implement efficient distribution schemes.

I. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE UNWILLING CO-CONSPIRATOR DOCTRINE IS INCONSISTENT WITH *MONSANTO*.

The "unwilling co-conspirator" doctrine, which has evolved from a line of decisions over the last 60 years,[3] holds that a dealer who is coerced into setting retail prices at the level sought by his supplier may claim he was damaged by an unlawful price-fixing agreement between his supplier and himself. *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968). The issue raised by this petition is the extent to which this doctrine, with its focus on implicit agreements resulting from involuntary assent, survives the Court's more recent antitrust decisions explaining the evidentiary requirements for proving illegal price-fixing conspiracies.

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[3]See *United States v. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Frey & Sons v. Cudahy Packing Co.*, 256 U.S. 208 (1921); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

This issue highlights a tension in antitrust law about the meaning of agreement. The unwilling co-conspirator doctrine holds that coerced acquiescence is sufficient to establish an agreement for purposes of section one. This is not easy to reconcile with the *Colgate* doctrine, which holds that a manufacturer may announce that it will sell only to dealers who charge recommended retail prices and will terminate those who do not. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Without more, this does not give rise to a section one violation. The manufacturer's actions are deemed unilateral under these circumstances, even though some dealers may have unwillingly agreed to charge suggested prices under the coercive threat of termination.

The expanding notions of agreement recognized in antitrust litigation during the Sixties and Seventies led some to conclude that the *Colgate* doctrine was an anomaly that had been eroded to the point of extinction. Professor Sullivan wrote in 1977, "Indeed, one may wonder whether *Colgate* is not now more than outmoded, whether its shade has not at last been quietly dispatched." L. Sullivan, *Handbook of the Law of Antitrust*, 394 (1977). In *Russell Stover Candies, Inc. v. F.T.C.*, 718 F.2d 256 (1983), the Federal Trade Commission brought an action designed as a direct challenge to the *Colgate* doctrine. The Eighth Circuit commented, "It may be that footnote 6 in *Albrecht* foreshadows the Supreme Court's overruling of *Colgate*," but concluded that any such overruling was for the Supreme Court to announce. 718 F.2d at 260.

Uncertainty about the continuing vitality of the *Colgate* doctrine was decisively put to rest in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). The court stated:

> A manufacturer generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); cf. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a

> distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

465 U.S. at 761.

The Court noted the difficulty in distinguishing joint action subject to per se condemnation from permissible unilateral behavior in the context of manufacturer-dealer relations. In order to minimize the danger that procompetitive practices be needlessly punished or deterred, the Court identified specific evidentiary requirements a plaintiff must satisfy to reach a jury on a per se claim of resale price maintenance. Among these, the Court explained in footnote 9 that there must be evidence "the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." 465 U.S. at 764 n.9.

Professor Areeda concludes that *Monsanto* undermines the concept of an unwilling co-conspirator based on an implicit agreement: "[T]he Court's statement that the manufacturer 'can announce . . . and refuse to deal' and that the dealer is 'free' to acquiesce in order to avoid termination is flatly inconsistent with the proposition that unwilling compliance creates an agreement or that the announced condition and compliance together create an 'implied' agreement." 7 P. Areeda, *Antitrust Law* ¶ 1446 at 90 (1986) (footnote omitted). Citing Areeda, the Ninth Circuit noted that the precedential value of the unwilling co-conspirator line of cases "has been cast into some doubt by *Monsanto*," though it did not specifically explore the issue. *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986).

The Court's reasoning in *Fisher v. Berkeley*, 475 U.S. 260 (1986), casts further doubt on whether coerced acquiescence can constitute an agreement for purposes of section one. The claim was that a municipal rent control program constituted a price-fixing arrangement between the City of Berkeley and landlords. The Court found no agreement, explaining: "A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." 475 U.S. at 267.

Most recently, in *Matsushita Electric Industrial Co. Ltd., v. Zenith Radio Corp.*, _____ U.S. _____, 106 S. Ct. 1348 (1986), the Court underscored *Monsanto's* emphasis on placing the burden on antitrust plaintiffs to distinguish joint from unilateral action. The Court noted that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." 106 S. Ct. at 1357. It explained: "[C]ourts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct." *Id.* at 1360.

Despite this line of authority, the Seventh Circuit concluded here that the unwilling co-conspirator doctrine retains its full vitality. The court of appeals' reasoning is irreconcilable with *Monsanto.* The Court ruled in *Monsanto* that proof of an illegal resale price maintenance agreement requires something more than a showing that the distributor conformed to the suggested price. There must also be proof that the dealer communicated its acquiescence.

The court of appeals concluded that footnote 9 cannot be read literally. It reasoned that the dealer could communicate his acquiescence implicitly. This means in effect that the "someth ng more" to charging the suggested price that a plaintiff must show could be charging the suggested price, which renders the footnote both circular and meaningless.

The court's basis for its interpretation is a reliance on principles of contract law: "If footnote 9 is interpreted in [a literal] way, . . . a more explicit agreement would be required to establish concerted action under the Sherman Act than to establish a contract enforceable under the Uniform Commercial Code." (p. 7a, *infra*)

This may be, but it is insufficient grounds for ignoring this Court's ruling. The danger of deterring or penalizing procompetitive action has led the Court quite consciously to impose higher evidentiary burdens on antitrust plaintiffs than are appropriate in other areas of the law. A threat by a dealer that it will cease dealing with its manufacturer unless the manufacturer terminates a discounting dealer, followed by the requested termination, might also be said to establish a contract enforceable under the Uniform Commercial Code. So might an announcement by a supplier that it

will terminate any dealer who discounts, followed by a dealer charging the suggested prices in order to avoid termination. But *Monsanto* and *Colgate* have established that neither, standing alone, is sufficient to establish an illegal price-fixing agreement under section one. As Judge Posner himself has written, "[t]he controlling consideration in an antitrust case is antitrust policy rather than common law analogies." *Olympic Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 376 (7th Cir. 1986).

II. THE COURT OF APPEALS DECISION UNDERMINES THE *MONSANTO* PROOF SCHEME AND NEEDLESSLY THREATENS EFFICIENT METHODS OF DISTRIBUTION.

The lure of treble damages makes the prospect of an antitrust claim a tempting one for a disgruntled dealer, particularly one who has followed a policy of discounting. His low prices would most likely have prompted complaints to the manufacturer from his fellow dealers. Relying on these complaints, the discounting dealer can claim that whatever happened to him was a result of an illegal agreement between the manufacturer and other dealers.

Recognizing the beneficial aspects of restrictive forms of distribution and the inevitability of dealer complaints about discounting under such distribution schemes, the Court responded in *Monsanto* by identifying the evidentiary burden a plaintiff dealer must meet. It is not enough merely to suggest that the manufacturer's actions were the result of a price agreement between its other dealers and itself. "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributor were acting independently." 465 U.S. at 764.

If *Monsanto* closed the door on unsubstantiated antitrust claims by unhappy dealers, the Seventh Circuit has opened an inviting window. Under the court of appeals decision, a discounting dealer need only claim, first, that his manufacturer said or did something to him which he perceived as an attempt at coercing him to raise his prices, and, second, that at some subsequent point he did raise

his prices to the suggested level. As in this case, all the evidence can come from the testimony of the dealer himself. So long as the dealer did charge the suggested retail prices at some point, the claim becomes impregnable to summary judgment or a directed verdict.

This possibility is a dangerous one for a manufacturer that relies on its dealers to provide pre-sale services. As the Court noted in *Monsanto*, the possibility of "free-riding" can lead a manufacturer to express a "strongly felt concern" to its dealers about the appropriate level of retail prices. 465 U.S. at 763. In the absence of coercion, a dealer is free to be persuaded by the manufacturer's views.

The danger to the manufacturer is that it is not always apparent when the line between persuasion and coercion is crossed, particularly since the distinction is one that rests primarily within the mind of the dealer. Dealers may hear messages that the manufacturer did not intend. The prospect of treble damages may tempt dealers to impart a coercive cast to their description of a manufacturer's actions.

Under the court of appeals decision, an intemperate word or a misunderstood conversation can arm a dealer with a treble damage time bomb. Anytime later, the dealer can claim that he had unwillingly raised his prices in response to what he perceived to be the coercion, and under the court of appeals decision that is enough evidence to sustain a verdict.

The danger is illustrated by the facts of this case. Isaksen testified that a Vermont Castings employee told him in September, 1982, that if he did not get his prices in line, his orders would be mixed up. He testified that he did not get his prices in line for a year, and his orders never were mixed up. Nevertheless, Isaksen testified that as a result of the threat a year earlier, as well as other actions he interpreted as punishment by the company, he raised his prices to the suggested retail level in September, 1983 for a four-month period. He never told Vermont Castings he was knuckling under to its threats and there was no evidence that the company knew what Isaksen's prices were during this period.

Two years later, in September of 1985, Isaksen filed this suit.

The unwilling co-conspirator claim was not among the allegations pled. Not until the litigation was well underway did Vermont Castings learn that Isaksen claimed he had been an unwilling co-conspirator with the company in an illegal price-fixing scheme. Thus in 1986 the company learned that what Isaksen understood as a threat in 1982 led to an alleged antitrust violation in 1983.

If this thin evidentiary showing is sufficient to sustain a verdict, the unwilling co-conspirator doctrine will become a welcome refuge for dealers unable to meet the more stingent *Monsanto* proof requirements. At the same time, manufacturers will be tempted to abandon what *Monsanto* recognized as efficient forms of distribution, for fear that their legitimate concern about dealers' prices may be construed as coercion and lay the predicate for a treble damage action. Consumer welfare will suffer.

The solution is the one the Court in fact adopted in *Monsanto*: require a sufficient evidentiary showing to minimize the risk that procompetitive distribution strategies are penalized or deterred. As the Court explained in footnote 9, plaintiffs should be required to prove in the unwilling co-conspirator context that they explicitly communicated their acquiescence to the manufacturer and that this communication was sought by the manufacturer.

This is the type of evidence that one would expect would be available when genuine acts of coercion are present and, as the district court noted, it is the type of evidence that it is within the power of plaintiffs to generate. At the same time, it serves the beneficial purpose of notifying the manufacturer of the dealer's interpretation of its perhaps ambiguous or unintended words or actions and allows it a chance to correct any misperceptions at a time where the damage can still be prevented.

It may be that the antipathy the Seventh Circuit has shown toward continued per se treatment of resale price maintenance helps explain its inattention to the evidentiary standards this Court has established for distinguishing between the permissable and illegal

in this area.[4] Whatever the reason, the court of appeals decision needlessly threatens efficient forms of distribution and should be reversed.

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 30, 1987

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[4]See *Illinois Corporate Travel v. American Airlines, Inc.*, 806 F.2d 722, 728 (7th Cir. 1986); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1438 (7th Cir. 1986); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 706-07 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984); *Valley Liquors, Inc. v. Renfield Importers, Inc.*, 678 F.2d 742, 744 (7th Cir. 1982).

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 86-2818

GREGGAR S. ISAKSEN
d/b/a APPLEWOOD STOVE WORKS,
Plaintiff-Appellant,

v.

VERMONT CASTINGS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 85 C 882—John C. Shabaz, Judge.

ARGUED APRIL 22, 1987—DECIDED AUGUST 4, 1987

Before POSNER and FLAUM, *Circuit Judges*, and WILL, *Senior District Judge**

POSNER, *Circuit Judge*. A dealer in woodburning stoves, Isaksen, claims in this suit that his supplier, Vermont Castings, coerced him to raise his retail prices for its stoves, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. There are also pendent claims, which the district court dismissed before trial, and of which more anon. The jury returned a verdict of $100,000 in damages, which was trebled as required by law, but then the district judge granted Vermont Castings judgment notwithstanding the verdict, noting in passing that the damage award was in

* Hon. Hubert L. Will of the Northern District of Illinois, sitting by designation.

any event excessive. 644 F. Supp. 1098 (W.D. Wis. 1986). Isaksen appeals.

This is a rather sorry excuse for an antitrust case, which may more than anything explain the district judge's action in granting judgment for Vermont Castings. Founded in 1975, Vermont Castings has, as the plaintiff admits, only 10 percent of the midwestern "market" in free-standing woodburning stoves (which are used for heating). We have difficulty understanding how free-standing woodburning stoves could be a meaningful product market, given such excellent substitutes as oil-burning and gas-burning furnaces; and how, even if they do compose a meaningful product market, a product shipped all over the country can be said to be sold in distinct regional markets. But even ignoring these problems, we would have difficulty understanding how a 10 percent factor in a tiny market could restrain competition (viewed as a means of promoting economic efficiency—the contemporary antitrust view, see, e.g., *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986)) merely by placing a floor under its dealers' prices ("resale price maintenance"). If the floor were set higher than necessary to induce dealers to provide the point-of-sale services that would maximize the sales of Vermont Castings' stoves, Vermont Castings not only would be transferring wealth from itself to its dealers (and why would it want to do that?) but would be pricing its stoves out of the market; consumers would switch to competing products whose retail prices were not inflated by resale price maintenance. It is easy to see, however, why, whether or not it possessed any market power, Vermont Castings might want to set the lowest floor under the retail prices of its stoves that would induce its dealers to provide the level of point-of-sale services that maximizes the welfare of consumers. See Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. Law & Econ. 86 (1960). As a new company, selling a somewhat complex product, Vermont Castings needed and

still needs dealers who understand the product, can explain it to consumers, and can persuade them to buy it in preference to substitute products made by more established firms. These selling efforts, which benefit consumers as well as the supplier, cost money—money that a dealer can't recoup if another dealer "free rides" on the first dealer's efforts by offering a discount to consumers who have shopped the first dealer. (The second dealer can afford the discount because he doesn't have to incur the selling expenses that were incurred by the first dealer.) As one of Vermont Castings' dealers explained in a letter to it, "The worst disappointment is spending a great deal of time with a customer only to lose him to Applewood [Isaksen] because of price. . . . This letter was precipitated by the loss of 3 sales of V.C. stoves today [to] people who[m] we educated & spent long hours with." A retail price floor prevents such free riding and thus encourages dealers to provide necessary point-of-sale services. And the supplier has every incentive to keep the floor as low as is consistent with assuring adequate services, since he doesn't want to make his product noncompetitive.

Yet as Isaksen keeps reminding us, arguments of this sort have not persuaded the Supreme Court to relax the judge-made rule, now more than 75 years old, that makes resale price maintenance illegal per se under section 1 of the Sherman Act, regardless of the circumstances of its adoption. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980). So all we must determine, on the liability phase of this case, is whether Isaksen put in enough evidence of resale price maintenance to get to the jury.

Vermont Castings gave a suggested retail price list to all its dealers, together with assurances that the prices were only suggested and that the dealers could sell at any price they wanted. Isaksen sold way under list price, and competing dealers bombarded Vermont Castings with com-

plaints about him; the letter we quoted was one of these complaints. Beyond this the evidence is sharply contested, but of course we must view it as favorably to Isaksen as the record warrants, since the jury found in his favor; nor can we disregard the verdict merely because almost all of the evidence favorable to Isaksen came from his own mouth.

Isaksen testified that when Vermont Castings discovered how low his prices were, it began to threaten him, and otherwise harass him, in a variety of ways. Although Vermont Castings denies any harassment, this was something for the jury to sort out. Harassment by itself, however, would not violate section 1 of the Sherman Act, a section that punishes only contracts, combinations, and conspiracies in restraint of trade and thus requires concerted action; harassment is unilateral. If, though, the harassment were pursuant to an agreement between Vermont Castings and its other dealers, the agreement to harass would be actionable. But there is insufficient evidence to justify an inference of agreement between Vermont Castings and its other dealers. Complaints to a supplier, made by competitors of a dealer who is cutting prices below suggested levels, are not, standing alone, evidence of agreement. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984); see also *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, No. 86-1040, slip op. at 8-9 (7th Cir. June 3, 1987); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1439-40 (7th Cir. 1986), and cases cited there. They may merely alert the supplier to the existence of a condition injurious to *him*, thus entitling him to take action to protect himself, regardless of the dealers' motivations in complaining. Vermont Castings may, as we have seen, have had its own reasons for wanting every dealer to sell at its suggested retail prices; so the fact that it may have harassed Isaksen in an effort to obtain his compliance is not evidence that it was acting in concert with the other dealers. Yet there is no other evidence of such concert.

With a conspiracy between Vermont Castings and its other dealers ruled out, the harassment of Isaksen could be actionable under section 1 of the Sherman Act only if it succeeded in getting him to agree to raise his prices. Vermont Castings could not concert with itself and was not proved to have concerted with any of its other dealers. The only agreement between it and Isaksen that could (on this record) have violated the antitrust laws would have been an informal agreement by Isaksen, knuckling under to pressure by Vermont Castings, to raise his prices.

Isaksen testified that Vermont Castings told him to raise his prices or it would mix up his orders and that in response to this threat he did raise his prices. The fact that Isaksen may have been coerced into agreeing is of no moment; an agreement procured by threats is still an agreement for purposes of section 1. See *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n. 6 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960). A conspiracy is not less sinister because some of its members are intimidated, rather than bribed, into joining it. Some cases even say that the plaintiff in a "vertical" price-fixing case such as this (that is, a case where the alleged price-fixing agreement is between firms at different levels in the production-distribution process, rather than between competing firms) must prove he was coerced. See, e.g., *Bender v. Southland Corp.*, 749 F.2d 1205, 1212 (6th Cir. 1984). But all they mean is that a plaintiff who is an involuntary participant must prove that the defendant induced his participation by conduct that went beyond merely announcing a policy of terminating dealers who sell below suggested retail prices; for such an announcement is privileged under *United States v. Colgate & Co.*, 250 U.S. 300 (1919). See *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 707 (7th Cir. 1984).

Isaksen also testified, however, that although the threat was made in September 1982, he didn't raise his prices until a year later. He admits that during the entire year

Vermont Castings never carried out its threat to mix up his orders. The timing casts serious doubt on the existence of a causal relationship between the threat and the raising of prices, for how can it be that the threat did not move him to act until the passage of time had shown the threat to be empty? He could have had other reasons for wanting to raise his prices in September 1983, including an expensive advertising campaign that he conducted in the fall of that year. Moreover, with one ambiguous exception the acts of harassment of which he complains (such as Vermont Castings' omitting him from a list of its dealers in a newspaper ad it ran) occurred *after* he finally raised his prices, rather than before.

Although such an analysis of the evidence might have furnished compelling grounds for granting Vermont Castings' motion to set aside the verdict as contrary to the clear weight of the evidence—and may yet do so, since the district judge has never ruled on the motion—it does not support the grant of judgment notwithstanding the verdict. Such judgment is proper only if, when the evidence is viewed in the light least favorable to the moving party, the verdict is unsupported. Given Vermont Castings' incentive to get Isaksen to agree to raise his prices, and his testimony that he did so, albeit belatedly, in response to Vermont Castings' threats, we cannot conclude that the verdict had no basis in the evidence. However, the verdict may, as we have said, have been so contrary to the weight of the evidence, as evaluated by the district judge in light of the witnesses' credibility and other relevant considerations, that a new trial is warranted. That is, the district judge might conclude that the verdict was not reliable enough to justify terminating the litigation without the additional confidence that a second verdict, rendered by a different jury, might impart if it agreed with the first verdict. This is a discretionary determination that must, if only because it involves a consideration of the witnesses' credibility, be made by the district judge rather than by the court of

appeals. On the difference between the standards for motions to grant judgment notwithstanding the verdict and motions for a new trial because the verdict was against the clear weight of the evidence, and on the difference in the appellate court's role in reviewing orders ruling on the two types of motion, see *Spanish Action Committee v. City of Chicago*, 766 F.2d 315, 319-21 (7th Cir. 1985).

In defending the judgment, Vermont Castings points us to a footnote in *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, 465 U.S. at 764 n. 9:

> The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

Vermont Castings reads this literally, to mean that unless Isaksen said to it, "I agree to adhere to your suggested retail prices," there was no agreement for purposes of section 1. If footnote 9 is interpreted in this way, however, a more explicit agreement would be required to establish concerted action under the Sherman Act than to establish a contract enforceable under the Uniform Commercial Code. We imagine that all the Court meant was that the mere fact of adherence to suggested retail prices does not establish an agreement to adhere to them. (But see Hay, *Vertical Restraints After Monsanto*, 66 Cornell L. Rev. 418, 435 (1985), adopting—and effectively criticizing—the literal reading.) If adherence alone could prove an agreement to adhere, the *Colgate* privilege—which allows a supplier to "coerce" the dealer's adherence by threatening to cut him off if he doesn't adhere, and which was strongly reaffirmed in *Monsanto*, *supra*, 465 U.S. at 763-64; see 7

Areeda, Antitrust Law ¶ 1446, at 85-86 (1986)—would be nugatory. Footnote 9 is a part of the discussion reaffirming *Colgate*. If a manufacturer distributes a price list, together with an announcement that he will cut off dealers who sell below the list prices, and dealers adhere to those prices because they don't want to be cut off, there is a realistic sense in which the threat of termination has induced the dealers to agree not to cut prices—to agree, in other words, to fix prices. That is the argument against *Colgate*. *Monsanto* rejects it. Nor can a dealer be allowed to manufacture an agreement by saying "I agree to abide by your suggested prices," when he has not been asked to agree. But we do not think the Court intended to go so far as to rule that if a supplier telephones a dealer and tells him, "Raise your price by next Thursday, or I'll ship you defective goods," and the dealer merely grunts, but complies, this is not actionable as an agreement to fix the dealer's resale price. If it were not, there would be very little left of the rule against vertical price-fixing, which the Court in *Monsanto* decided not to reexamine. See 465 U.S. at 761 n. 7. Professor Areeda points out that after *Monsanto* "no agreement is formed when a dealer unwillingly complies solely because he wishes to avoid termination." 7 Areeda, *supra*, ¶ 1451e, at p. 128. This is just *Colgate* again: the motives for the dealer's adhering to a suggested list price are irrelevant. If (but only if) he *agrees* to adhere (having been asked to), there is an agreement, no matter how unwilling he is; but it does not follow that his agreement to adhere can never be implicit, or signified by conduct in lieu of promissory language.

Vermont Castings' list of suggested prices stated that the dealer was not being asked to agree to adhere to them, and was free to depart from them; so if Isaksen did adhere, clearly it was not because he had agreed to do so, whether implicitly or explicitly, on the basis of a solicitation in the price list—there was no solicitation. Any agreement came later, when Vermont Castings told Isaksen, "Raise your

prices or else," and Isaksen raised his prices only because he feared that otherwise Vermont Castings would wreck his business by mixing up his orders. It is as if Vermont Castings had told Isaksen that it would reduce its wholesale price to him if he raised his retail price, and Isaksen had accepted the offer by raising his price.

Although we think the district judge erred in granting judgment for Isaksen notwithstanding the verdict, we agree that the damages are grossly excessive. Unlike the usual dealer antitrust case, Isaksen was not terminated, so he can claim damages only from (1) the harassment that supposedly induced him to agree to raise his prices or punished him for having been slow to honor the agreement, and (2) any profits, not due to free riding, that he lost during the months when (against his better business judgment) he raised the prices he was charging for Vermont Castings stoves, as he had agreed—we are assuming—to do. The second point requires elaboration. Although Isaksen may well have suffered losses during the period of Vermont Castings' unlawful activity, he made no effort to establish how much of the loss was due to that activity as distinct from unrelated business factors. The most important such factor was the diminished demand for woodburning stoves. Not only had the market for such stoves become saturated, but oil prices had begun to fall, making wood a less attractive fuel for heating, relative to oil, than it had been before. All Isaksen did to prove damages was to compare his average profits for several years before and several years during the period of unlawful activity. *Post hoc ergo propter hoc* is not a valid methodology of damage calculation, especially when it is apparent that other causal factors are at work.

A further wrinkle is that if Isaksen's profits before he knuckled under to Vermont Castings' pressure were due in part to his taking a free ride on other dealers, who provided valuable point-of-sale services that he did not provide, he could not use those profits as his benchmark in

calculating the loss of profits that was caused by his raising his prices later under pressure from Vermont Castings. The prevention of free riding is not, as yet anyway, a defense to a charge of resale price maintenance; but neither is being prevented from taking a free ride on another dealer's efforts a form of antitrust injury compensable by a damage award. See *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1202 (7th Cir. 1986); cf. *Jack Walters & Sons Corp. v. Morton Building, Inc.*, *supra*, 737 F.2d at 709.

The jury pulled the figure of $100,000 out of a hat in which Isaksen's expert witness had done the usual magic tricks; but as there was no evidence of how much the antitrust violation, as distinct from unrelated market forces, contributed to Isaksen's losses, or of how much of the loss was an antitrust injury as distinct from a purely private loss from being deprived of the opportunity to take a free ride on competing dealers, the expert's efforts to translate his losses into a present-value figure were irrelevant. We do not allow antitrust plaintiffs or any other plaintiffs to obtain damage awards without proving what compensable damages were actually suffered as a result of the defendant's unlawful conduct. *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, *supra*, 797 F.2d at 382-83.

So the damage phase of the trial must be retried. The liability phase may well have to be retried as well. The judge, unfortunately, did not comply with Rule 50(c)(1) of the Federal Rules of Civil Procedure, which requires a judge when he grants judgment notwithstanding the verdict to rule at the same time on the movant's alternative motion for a new trial, so that both rulings can be reviewed in the same appeal rather than successive appeals. Vermont Castings based its motion for a new trial not only on the excessiveness of the damages and the weakness of the evidence to support the finding of liability but also on alleged errors in the instructions. The judge made no ruling on the motion (although he remarked in passing on the

excessiveness of the damages), and the correctness of the instructions is not before us. On remand the judge will have to rule on the motion for a new trial. Rule 50(c)(1) is a good rule; it should be obeyed.

We move on to the pendent claims. One is shallow; this is Isaksen's claim that Vermont Castings libeled him by omitting his name from a list of its dealers that it circulated in Isaksen's market areas. (This was also one of the alleged acts of harassment.) The objection to this claim that there can be no defamation without a statement is superficial; the list is a statement, and the omission of Isaksen from the list could make the list a statement that he is not a Vermont Castings dealer. But not every slight is a slander or libel. The courts of Wisconsin (whose law applies to the pendent claims) require a threshold determination by the trial court that the imputation "tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Converters Equipment Corp. v. Condes Corp.*, 80 Wis. 2d 257, 262, 258 N.W.2d 712, 715 (1977) (footnote omitted). The reference to reputation is important. Omitting Isaksen's name from a list of Vermont Castings' dealers may have prevented third persons from dealing with him, but the same thing happens when the phone company accidentally drops a subscriber from the yellow pages. More is necessary than a diminution of transactional opportunities. In a business setting the imputation, to count as defamation, must charge dishonorable, unethical, unlawful, or unprofessional conduct. See *id.* at 263, 258 N.W.2d at 715. No such meaning could possibly be teased out of the omission of Isaksen's name from a list of Vermont Castings' dealers. To imply that a person is not a dealer in Vermont Castings' freestanding woodburning stoves is not to place the commercial equivalent of the mark of Cain on him.

The other pendent claim relates to the Wisconsin Fair Dealership Law, Wis. Stat. §§ 135.01 *et seq.*, which

among other things requires a franchisor—as Vermont Castings is conceded to be—to notify his franchisee in advance if the franchisor intends to do anything that will bring about a "substantial change in [the franchisee's] competitive circumstances." Wis. Stat. § 135.04; see *Remus v. Amoco Oil Co.*, 794 F.2d 1238, 1240 (7th Cir. 1986). Isaksen argues that the harassment to which Vermont Castings subjected him caused a substantial change in his competitive circumstances; and of course no statutory notice was given ("I plan to start harassing you in 90 days"). But as the harassment ended more than a year before this suit was filed, we agree with the district judge that the claim is barred by the statute of limitations. See Wis. Stat. § 893.93(3)(b).

As part of the alleged harassment, Vermont Castings demanded that Isaksen sign a new and less favorable dealership agreement and threatened to terminate him if he refused. Vermont Castings repeated this threat in a counterclaim. The counterclaim asks for a declaratory judgment that Vermont Castings is entitled to terminate him if he refuses to sign the new agreement, which all of Vermont Castings' other dealers in Wisconsin have signed. Isaksen argues that such a threat if carried out would be termination "without good cause," and would therefore violate the Fair Dealership Law. See Wis. Stat. § 135.03. The district judge disagreed, ruling that if Isaksen refuses to sign the new agreement Vermont Castings can terminate him. The judge made this ruling, however, after entering judgment for Vermont Castings on the antitrust count, and we think that a final determination of the issue must abide the final determination of antitrust liability. If as Isaksen contends Vermont Castings is trying to get rid of him because he won't play ball on prices, terminating him ostensibly for his refusal to enter into a new agreement could not be for "good cause"; a termination incidental to an antitrust violation would not be for good cause. Of course, just because Vermont Castings may have violated the antitrust laws

(though this remains to be determined, given the motion for a new trial, which the district judge has yet to act on), it does not follow that it can never change the terms of the dealership agreement to Isaksen's disadvantage. But the judge's determination as to whether the change was independent of the violation was infected, indeed determined, by his premature conclusion that there had been no violation, so he must reconsider the issue after he resolves the antitrust issue in accordance with this opinion. Circuit Rule 36 shall not apply on remand.

REVERSED And REMANDED, With DIRECTIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GREGGAR S. ISAKSEN, d/b/a
APPLEWOOD STOVE WORKS,

Plaintiff,

v.

VERMONT CASTINGS, INC.,
a Vermont Corporation,

Defendant.

MEMORANDUM AND ORDER

85-C-882-S

In this antitrust action, defendant Vermont Castings, Inc. asks for relief from the judgment entered upon a jury verdict. The facts are as follows:

FACTS

The background facts are simply stated. Plaintiff Gregor (sic) Isaksen, doing business as Applewood Stove Works from Poynette, Wisconsin, began selling wood stoves and accessories in 1975. In early 1982 he became an authorized dealer of defendant Vermont Castings, Inc., a Vermont manufacturer of wood burning stoves and accessories. Originally a direct mail order company, Vermont Castings began developing a dealer network which by 1982 accounted for about two-thirds of its business. By 1985 only 10 percent of its sales were direct. Vermont Castings has the largest share of the wood stove market in the United States and the Midwest, holding shares of 8 percent and 10 percent, respectively.

From the beginning of the dealership arrangement plaintiff advertised throughout Wisconsin and neighboring states, emphasizing low prices for Vermont Castings stoves, prices which were below defendant's suggested retail prices. Although pricing decisions were explicitly left up to the judgment of individual dealers, defendant began

receiving complaints about plaintiff's pricing practices from other dealers almost immediately. Defendant's response to complaining dealers consisted of, essentially, a denial that it had the power to stop such practices, although Vermont Castings had some sympathy for their plight.

However, the story did not end at that point, and plaintiff asserts that later actions of defendant against plaintiff's interests were in reality designed to force him to conform to the suggested retail price. The later relations between the parties will be discussed in the body of the opinion.

MEMORANDUM

I The first part of defendant's motion for judgment after the verdict attacks the legal and factual sufficiency of plaintiff's theory that plaintiff was an unwilling co-conspirator in a price fixing conspiracy when he brought his price up to the suggested retail price in the fall of 1983. Defendant's argument is based on the simple and persuasive proposition that the facts do not conform to the requirements of such a conspiracy set forth in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984). The Court stated, at 1471 (n. 9), that:

> The concept of a "meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

Since it is undisputed that plaintiff never told the defendant that he was raising his prices (whether to conform to defendant's implicit demands or otherwise), it is defen-

dant's position that there was no communication of acquiescence as required by *Monsanto*.

Plaintiff's response is wholly unpersuasive. Basically, plaintiff argues that *Monsanto* did not explicity hold that a distributor's actions in compliance with a demand would not constitute acceptance. It is true that there was no such explicit holding. However, plaintiff ignores both the implication of the above quoted language and the clearly articulated reason behind the evidentiary standard adopted by the Court:

> [I]t is of considerable importance that independent action by the manufacturer, and concerted action on non-price restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages. On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.

Id. at 1470. A factfinder may be justified in inferring a demand to comply with price restrictions through evidence of pricing complaints from other distributors and non-price retaliatory acts by the manufacturer. The jury here evidently did so. However, price complaints alone are clearly not enough. *Id.* at 1471. The remainder of the evidence of defendant's actic ıs unconnected with price are certainly "highly ambiguous" inasmuch as there was evidence of continual misunderstandings and ill-feeling between plaintiff and defendant which, on defendant's part, may or may not have been related to pricing. Under such circumstances, the Court concludes that *Monsanto*

demands a clearly communicated acquiescence in defendant's suggested price before plaintiff can be said to have established a price-fixing conspiracy. Unless either the manufacturer's demand or the distributor's acquiescence is explicit, the evidence of a conspiracy is simply too tenuous to allow an award of treble damages under the antitrust law. Plaintiff here was never told by defendant to raise prices or suffer consequences, and plaintiff never told the defendant that he was raising his prices because he understood that to be defendant's demand. When it is at least debatable that a manufacturer does not mean to demand compliance with a suggested price, and plaintiff must admit that it is debatable here, the Supreme Court's requirement of a communicated acquiescence must be read literally to avoid the risk that a conspiracy will be inferred where none exists. It is not asking too much of an antitrust plaintiff to comply with this dictate since the proof of a conspiracy will be entirely within his power to produce in the circumstances illustrated by this case.

Nor can plaintiff successfully argue that there was a contract, as opposed to a conspiracy, for there is clearly no meeting of the minds produced by uncommunicated acceptance of an ambiguous offer. To rule otherwise would be to judicially create a contract at the whim of one party while the other party had no intention of being bound. None of the authority cited by plaintiff supports the proposition that an ambiguous offer, followed by performance without explicit acceptance, constitutes a contract.

Accordingly, no price-fixing conspiracy between the plaintiff and defendant was ever established. Therefore, plaintiff cannot recover on this theory.

II. Plaintiff's other theory of recovery is no less problematical, and the Court concludes that the evidence is insufficient to establish a price-fixing conspiracy between defendant and its other distributors.

As *Monsanto* made clear, something more than evidence of complaints about plaintiff's pricing practices by other distributors is necessary:

> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.

104 S.Ct. at 1471. As later rephrased in *Matsuishita* (sic) *Elec. Indus. Co. v. Zenith Radio*, 106 S.Ct. 1348, 1357 (1986):

> [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

The weight of this burden was recently illustrated by the Court of Appeals in *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986). The letter terminating the antitrust plaintiff in *Morrison* actually cited price cutting as one of the reasons for termination and was clearly induced by a competitor's complaint. Nevertheless, the Court determined that the evidence was insufficient to support the existence of a price-fixing agreement. The facts of *Morrison* are clearly distinguishable, but the Court's analysis is not altogether inapplicable here, as will be shown below.

A review of what evidence, other than the complaints of other dealers, plaintiff presented is in order. Early in the relevant period, defendant expressed some concern to plaintiff that his pricing policies were out of the ordinary. Also, shortly after being granted a dealership plaintiff was assured that for purposes of areas of primary responsibility plaintiff would be given access and promotional assistance in the Madison, Wisconsin area and that a competing dealer south of Madison (in Janesville) did not intend to exploit that territory. However, defendant's promotional

efforts in 1982 were geared to zip code areas, and plaintiff's competitor received assistance in the area surrounding Madison (although not in the City itself, which had zip codes assigned to plaintiff). Plaintiff objected to this assignment and was told that defendant was unable to divide mailings more specifically than by the first three digits of the zip codes. This was unsatisfactory to plaintiff, and he declined to participate in a similar program the next year. Plaintiff's name was also left off several lists of dealers contained in the defendant's publication "Owner's News" which was sent to all known owners of defendant's products. Most importantly, in 1983 defendant undertook a promotional campaign known as "Close the Loop" where potential customers who responded to company advertising were directed to dealers in their area. Plaintiff received few such referrals, but plaintiff's main competitor from Janesville (who had opened a shop in Madison with defendant's assistance) received hundreds of such referrals, including some who were very close to plaintiff's shop in Poynette. Finally, plaintiff requested that defendant dropship woodstoves to a branch store that plaintiff unilaterally opened in Superior, Wisconsin. Defendant refused to ship stoves to this store (instead shipping them to Poynette) on the ground that plaintiff needed the Company's permission to open a new store, and that plaintiff's Superior manager was a dealer with whom the defendant had previously refused to deal.

Defendant argues, and presented some evidence at trial, that it had a legitimate reason to be concerned with dealer's profit margins. The reason was that its dealers needed sufficient profits to promote the company's products. The defendant was also concerned that plaintiff's advertising of low prices in the areas served by other dealers created a "free rider" problem where a dealer's customer service efforts would be undercut, and rendered useless, by plaintiff's lower price. The defendant also argued that its dealer contract reserved the right to assign areas of primary

responsibility in its own best interest, and that some of the problems with leaving plaintiff's name off some promotional materials were the result of accident or misunderstanding.

It is clearly legitimate for a manufacturer to protect its dealers against free riders. *Monsanto*, 104 S.Ct. at 1470; *O.S.C. Corp. v Apple Computer*, 792 F.2d 1464, 1468 (9th Cir. 1986). While the evidence was scant that plaintiff had profited from free riding, it is clear that the threat was manifest. Concern with dealer profit margins is equally blameless inasmuch as defendant was phasing out its direct sales activities and needed a strong dealer network to retain its market share. The exchange of information on this subject does not subject the manufacturer to an inference of price-fixing. *Monsanto*, 104 S.Ct. at 1470.

The *Apple Computer* case cited above provides an excellent illustration of the kind of problem presented by this case. The Court cited the following evidence of record in that case as insufficient to support the inference of a price-fixing agreement where price cutting mail order dealers were terminated:

> The dealers' evidence of a price-fixing conspiracy consisted of the (1) complaints to Apple about mail order dealers' price discounts; (2) the outright and sudden elimination of mail order sales and termination of those dealers who continued such sales; (3) several meetings involving dealer and manufacturer representatives in which mail order discounting was allegedly raised; (4) a conversational statement by Apple's president that while he could not legally discuss pricing, something was going to be done about price erosion; (5) an incident in which Apple allegedly coerced mail order dealers to "get their prices up;" (6) Apple's alleged conditioning of new locations for mail order dealers upon their agreement to cease

> discounting; and (7) Apple's alleged agreement with one of the plaintiffs to not advertise prices.

792 F.2d at 1468. Clearly, this is a much stronger case than plaintiff was able to produce. The Court noted the same principles cited by this Court from *Monsanto*. The Court pointed out that Apple representatives discouraged price discussions at dealer meetings much the same way that defendant here told complaining dealers that it could do nothing about plaintiff's pricing. The Court concluded that the defendant's remark about "price erosion" was "entirely consistent with a manufacturer's right to invoke vertical non-price restraints that 'ensure that its distributors earn sufficient profit to pay for [desired] programs.' " *Id.* at 1469, citing *Monsanto*.

If all of this were not enough to dispel any inference of a conspiracy to fix prices, there is the fact that defendant simply had no motive to enter into such a conspiracy. *Matsushita* teaches that the lack of economic incentive to enter into an antitrust conspiracy is probative and compelling evidence that no such conspiracy existed:

> It follows from these settled principles that if the factual context renders respondents' claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

106 S.Ct. at 1356. Defendant's concern for its own economic benefit simply had to have been confined to volume, since it sold its product to the dealers without price discrimination, and it was phasing out its own direct sales program. Therefore, the defendant had no reason to punish a dealer who sold at low prices except insofar as such price cutting impacted upon other areas of legitimate con-

cern to the company. The nigher (sic) prices which would be the result of such a conspiracy would ordinarily be expected to cut into that volume. Defendant had no apparent reason to wish such a result. As the Court of Appeals pointed out in *Murray Biscuit*, 797 F.2d at 1439-40, a problem of legitimate concern to the manufacturer will often manifest itself as a price complaint from another dealer. This does not necessarily mean that the action taken by the manufacturer in response to such a complaint amounts to price fixing. Yet that is the conclusion plaintiff urged upon the jury and the jury succumbed to these blandishments.

Accordingly, the verdict eannot stand, and defendant is entitled to judgment notwithstanding the verdict.

III. The above conclusion makes it unnecessary to address defendant's arguments in support of a new trial. The Court does note, however, that defendant would be entitled to a new trial on damages as the damage verdict was clearly excessive. While there is nothing inherently wrong with comparing profits before and during the wrongful actions of an antitrust defendant, a plaintiff must offer some foundation that the periods were otherwise comparable. Plaintiff did not do so here. Further, there was not any attempt at all to show how the reduced profits were caused by defendant's allegedly illegal activities. The conclusion was almost inescapable that plaintiff's lower profits during the relevant period before trial were, at least in significant part, the result of industry-wide depressed conditions and what amounted to distress sales by plaintiff which were not attributable to defendant's actions. Finally, given plaintiff's right to equitable relief upon success in this lawsuit and the fact that plaintiff could not ground his losses on increased competition from other dealers, future losses were, to say the least, extraordinarily speculative. The Court concludes that plaintiff simply failed to prove antitrust damages in an amount anywhere near those

awarded by the jury. *See*, generally, *MCI Communications v. AT&T*, 708 F.2d 1081, 1160-69 (7th Cir. 1983), *cert. den.*, 464 U.S. 891.

ORDER

IT IS ORDERED that defendant's motion for judgment notwithstanding the verdict is GRANTED.

Let judgment be entered accordingly, with costs to the defendant.

Entered this 3rd day of October, 1986.

BY THE COURT:

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

Judgment of the Court of Appeals for the Seventh Circuit

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 4, 1987.

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. HUBERT J. WILL, Senior District Judge*

GREGGAR S. ISAKSEN d/b/a APPLEWOOD STOVES, Plaintiff-Appellant, No. 86-2818 vs. VERMONT CASTINGS, INC., a Vermont Corporation, Defendant-Appellee.	Appeal from the United States District Court for the Western District of Wisconsin. No. 85 C 882 JOHN C. SHABAZ, Judge

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with DIRECTIONS, with costs, in accordance with the opinion of this court filed this date.

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* Hon. Hubert L. Will of the Northern District of Illinois, sitting by designation.

NO. 87-728

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VERMONT CASTINGS, INC.,
Petitioner,
v.
GREGGAR S. ISAKSEN
d/b/a APPLEWOOD STOVE WORKS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT GREGGAR S. ISAKSEN IN RESPONSE TO PETITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, when one party, in direct competition with and having economic power over another, coerces the other to charge certain prices in interstate commerce and the other submits to the coercion and charges the prices but does not inform the coercing party that he is going to do what he is being coerced to do, there is a violation of §1 of the Sherman Act.

2. Whether *United States v. Colgate & Co.*, 250 U.S. 300 (1919) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) should be regarded as authority for the proposition that combinations in restraint of trade achieved by coercion are allowed by §1 of the Sherman Act.

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NO. 87-728

IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT GREGGAR S. ISAKSEN IN RESPONSE TO PETITION

POSITION OF THE RESPONDENT

The respondent, Greggar S. Isaksen, joins in the petition of Vermont Castings, Inc. for a writ of certiorari in this matter if the Court grants a writ of certiorari pursuant to the petition of Greggar S. Isaksen filed on October 14, 1987 as number 87-610. The Court's resolution of the questions presented by each petition would likely have a bearing on the questions presented in the other. On the other hand, if the Court were to deny certiorari in case number 87-610, the respondent would oppose the granting of certiorari in this case number 87-728.

COUNTERSTATEMENT OF THE CASE

We call attention to the Statement of the Case in the petition for writ of certiorari by Greggar S. Isaksen in case number 87-610 and incorporate that Statement herein by reference.

SUMMARY OF THE ARGUMENT

The court of appeals correctly rejected the literal reading of footnote 9 in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Pet. App. pp. 7a-8a. That reading would hold that some types of contracts restraining prices are not prohibited by §1 of the Sherman Act.

The issues answered in *Monsanto* as well as *United States v. Colgate & Company*, 250 U.S. 300 (1919) pertained only to a possible contract or conspiracy. *Colgate* was decided on the basis that an agreement was necessary for a Sherman Act combination and that no such agreement was alleged. This view, however, was disavowed in *United States v. Parke, Davis & Company*, 362 U.S. 29 (1960) and *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), as well as in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911); *Eastern States R.L.D. Asso. v. United States*, 234 U.S. 600 (1914); *Federal Trade Com. v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) and has not been followed in numerous court of appeals decisions.

Regardless of whether prices are restrained by contract or conspiracy or combination caused by coercion or other means the actions are illegal.

The court of appeals correctly recognized that, when there is a "*Colgate*" type of an announcement by a manufacturer to dealers that they will be cut off if they do not comply with pricing requests and dealers comply, they have been induced by threats to charge the requested prices. The court said that when dealers comply "there is a realistic sense in which the threat of termination has induced the dealers to agree not to cut prices - to agree, in

other words to fix prices." Pet. App. p. 8a. We submit that what occurs is not so much an agreement but rather a combination caused by a threat.

The distinction between an agreement and a combination is not important as far as the Sherman Act is concerned but it is important in examining decisions to determine what has been decided.

In the fact situation now before the Court, the court of appeals found that there was evidence showing that the respondent, Isaksen, for a four month period, adhered to prescribed prices as the result of coercion. This clearly appears from the record. See Isaksen Petition for Writ of Certiorari in Case #87-610, at 6-8. There is no basis, we submit, for overturning this part of the court of appeals' decision. Any argument that *Colgate* and *Monsanto* should be regarded as authority for the proposition that coerced price fixing is permissible should be rejected. The *Colgate* dictum has been disavowed and should be expressly withdrawn.

ARGUMENT

I. A Contract May Be Formed Without Communication By The Offeree

As the court of appeals pointed out, the view of the Petitioner, Vermont Castings, with respect to footnote 9 of *Monsanto* would require a more explicit agreement under the Sherman Act than under contract law. Pet. App. p. 7a.

Suppose B has on hand a piece of patented, trademarked or copyrighted property for which he paid $50,000.00. A, the manufacturer, says to B that if B sells it for less than $100,000.00 A will not sell another piece of that equipment to B. B sells the item for $100,000.00 believing that he must do so in order to buy another. There is no contract. But there is action pursuant to a *threat* in the classic

meaning of the word. *N.L.R.B. v. Local 254, Building Service Employees Int. U.*, 359 F.2d 289, 291 (1st Cir. 1966). If A *promises* B that he will sell to B another item of that property for $50,000.00 if B sells the first for at least $100,000.00 and B so conducts himself, there is a contract even though B does not communicate to A his acceptance. *Williston on Contracts*, Third Ed. §68 (1957); *Restatement (Second) of Contracts* §54 (1981); *Compton v. Shopko Stores, Inc.*, 93 Wis. 2d 613, 625, 287 N.W.2d 720, 726 (1980) "[P]erformance . . . is also an overt manifestation of assent." *Williston*, §68.

II. Coerced Price Setting Is Not Allowed

From the earliest times this Court has held that illegal combinations prohibited by §1 of the Sherman Act occur when price maintenance is achieved as the result of coercion.

The terms "contract", "combination" and "conspiracy" in §1 of the Sherman Act were used in a broad sense of arrangements which had an effect upon prices, and were not used in the simple sense of a "contract". *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 498 (1940). The Senate resolution, which in 1888 directed the formulation of the bill, sought measures to set aside, control, restrain or prohibit "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations . . . which tend to prevent *free and full competition* . . . with such penalties and provisions . . . as will tend to preserve freedom of trade and production, the natural competition of increasing production, the lowering of prices by such competition." *Id.* at 493, n. 15 (emphasis by the Court).

Saying that "[t]he Sherman act has been so frequently and recently before this court as to require no extended discussion now" the Court in *Eastern States R.L.D. Asso. v. United States*, 234 U.S. 600, 609 (1914) repeated its

earlier holding in *Gompers v. Buck's Stove & Range Co.*, 221 U.S 418 (1911) that:

> "It [the Sherman act] covered any illegal means by which interstate commerce is restrained . . . whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, *threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter.*" 234 U.S. at 611 (Emphasis added).

Federal Trade Com. v. Beech-Nut Packing Co., 257 U.S. 441, 455 (1922) held that the Sherman Act was violated by coercive methods "in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose."

United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722 (1944) noted that in *Beech-Nut* the company "without agreements, was found to suppress the freedom of competition by coercion of its customers. . . ."

United States v. Parke, Davis & Company, 362 U.S. 29, 43 (1960), following *Beech-Nut*, and finding adherence to prices as a result of coercion, held that "an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied. . . ." (Emphasis by the Court)

Simpson v. Union Oil Company of California, 377 U.S. 13, 17 (1964) stated that "[w]e made clear in *United States v. Parke, Davis & Co.* . . that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. *We reiterate that view, adding that it matters not what the coercive device is.*" (Emphasis added)

Albrecht v. The Herald Co., 390 U.S. 145, 149, 150 n. 6 (1968) held that §1 of the Sherman Act "covers combinations in addition to contracts and conspiracies, express or

implied", that in *Parke Davis* "[t]he combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination" and that "[u]nder *Parke, Davis* petitioner could have claimed a combination between respondent and himself, *at least as of the day he unwillingly complied with respondent's advertised price.*" (Emphasis added)

Many different types of coercive devices have been used whereby price maintenance has been secured and the courts of appeals have uniformly held that the combinations achieved violate §1 of the Sherman Act. *See, Bowen v. New York News, Inc.*, 522 F.2d 1242, 1254-56 (2nd Cir. 1975), *cert. denied*, 425 U.S. 936 (1976) (surveillance and retaliation); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53 (2nd Cir. 1980) (threats of non-renewal of annual lease); *Osborn v. Sinclair Refining Company*, 324 F.2d 566, 574 n. 13 (4th Cir. 1963) ("If the arrangement or combination between the seller and his dealers is put together through the coercive tactics of the seller alone, this is sufficient."); *Phillips v. Crown Central Pet. Corp.*, 602 F.2d 616, 627 (4th Cir. 1979) *cert. denied*, 444 U.S. 1074 (1980) ("Short-term leases have been found to be inherently coercive. . . . Plaintiffs . . . were threatened with abrupt cancellations. . . ."); *Guidry v. Continental Oil Co.*, 350 F.2d 342, 343 (5th Cir. 1965) ("A supplier may not use coercion on its retail outlets to achieve resale price maintenance." Use of short-term leases to secure prices.); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965) (same as *Guidry*); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 32-35 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972) (threats to vary "temporary competitive allowance" for dealers; the treatment of the plaintiff was deemed to be a threat to others); *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976) (use of invoice forms to keep General Foods advised as to prices for major purchasers plus termination of dealership); *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984) (abusive

audits, termination threats, threats of opening a competing franchise); *Q.R.S. Music Co. v. Federal Trade Commission*, 12 F.2d 730, 732-33 (7th Cir. 1926) (A manufacturer "cannot lawfully by agreement fix and enforce the price at which the retailers shall sell. . . . Nor can respondent accomplish the same result by means that do not rise to the dignity of an express agreement. . . ."); *Hewitt v. Joyce Beverages of Wisconsin, Inc.*, 721 F.2d 625, 628 (7th Cir. 1983) ("Of course, knowledge that Joyce had actually coerced some distributors might cause other distributors to comply. . . ."); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234 (7th Cir. 1982) aff'd 465 U.S. 752 (1984) ("An unlawful resale price maintenance scheme can be effected in either of two ways: . . . an express or implied agreement . . . or the manufacturer may secure adherence to its suggested resale price through coercion. . . ."); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 707 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984) (the use of "persuasion and policing" in addition to announcement of a termination policy); *Arnott v. American Oil Company*, 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980) (threat of non-renewal of short-term leases and eventual cancellation of lease); *Canadian American Oil Co. v. Union Oil Co.*, 577 F.2d 468, 472 (9th Cir. 1978), *cert. denied*, 439 U.S. 912 (1978) (Denial of promised discount on price to dealer and eventual invocation of 90 day termination clause in gasoline supply contract. "We cannot say that the omnipresent threat of dealer contract cancellation for failure to conform one's retail prices to those announced by Union's price support program is not coercive."); *Sahm v. V-1 Oil Company*, 402 F.2d 69 (10th Cir. 1968) (threat to terminate which was made before termination); *Adolph Coors Company v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (reports to dealers that other dealers had been cut off or would be because of their prices); *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 732

F.2d 779, 780 (10th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984) (on rehearing) ("[W]e do not construe *Monsanto* as a retreat from those cases holding that a combination occurs between a seller and buyers 'whose acquiescence in [the seller's] firmly enforced restraints was induced by "the communicated danger of termination." ' ")

None of the foregoing cases requires a communication from a coerced party to the coercing party that the coerced party is going to do what he is being coerced to do.

No one charged with participation in a crime by coercing another to do an unlawful act may escape punishment because he did not receive a communication from the coerced party. By the act of coercion the first expects the second to comply.

III. Neither *Colgate* Nor *Monsanto* Is Authority For The Proposition That Coerced Price Setting Combinations Are Permissible

In order to determine to what extent a case is a precedent it is necessary to examine the questions presented, which must be "in the context of a specific live grievance" and determine how the questions were decided. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

In *United States v. Colgate & Co.*, 250 U.S. 300 (1919) the facts alleged in the indictment, which was dismissed by the district court upon a demurrer, were practically identical to those in *United States v. Parke, Davis & Company*, 362 U.S. 29 (1960).

Colgate decided that there could not be a combination without an agreement. *Beech-Nut* and *Parke, Davis* decided that there could be. Although the word "combination" was used in the *Colgate* indictment and there was no use of the words "agreement," "contract" or "conspiracy", this Court considered that the only question to be

decided was whether the indictment showed an agreement, saying:

> And we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers *under agreements* which obligated the latter not to resell except at prices fixed by the company. 250 U.S. at 306-307 (emphasis added).

As this Court stated in *Parke, Davis*, "[t]he *Colgate* decision distinguished *Dr. Miles* on the ground that the Colgate indictment did not charge the company with selling its products to dealers *under agreements* which obligated the latter not to resell except at prices fixed by the seller." 362 U.S. at 38 (emphasis by the Court).

What followed in the *Colgate* opinion with respect to the right to deal was unnecessary dictum, from which this Court departed three years later in *Beech-Nut*.

The *Colgate decision* that there must be an agreement in order to have a combination has been implicitly and repeatedly overruled by this Court, as shown in the preceding section of this brief.

The *Colgate dictum* with respect to the so-called right to deal has not been directly attacked in this Court but it has been so frequently and extensively circumscribed that there is nothing left of it, unless, as Vermont Castings claims, it has been reinstated by *Monsanto*.

In *Parke, Davis*, the Court did not address the question of whether the *Colgate* dictum should be *directly* overruled because "[t]he Government concedes *for the purposes of this case* that under the *Colgate* doctrine a manufacturer, having announced a price maintenance policy, may bring about adherence to it by refusing to deal with customers who do not observe that policy." 362 U.S. at 37 (emphasis added).

Four years after *Parke, Davis*, the Court, in *Simpson*, expressly made the point that "it matters not what the coercive device is", thus completely disavowing the *Colgate dictum*. *Simpson*, 377 U.S. at 17.

The *Monsanto* opinion of this Court did not reinstate the *Colgate decision* that an agreement was a requisite of a combination. Further, the *Monsanto* opinion did not reinstate the *Colgate dictum*. The *Monsanto* case in this Court reviewed *Spray-Rite Service Corporation v. Monsanto Company*, 684 F.2d 1226 (7th Cir. 1982). The jury had been informed that Spray-Rite "had to prove the existence of an agreement, conspiracy or combination. . . ." *Id.* at 1234. However, the question as stated by the court of appeals was only whether "Monsanto and some of its distributors conspired. . . ." *Id.* at 1233. The *Monsanto* brief to this Court presented two questions both relating to a "price fixing conspiracy", the second of which asked "[c]an a *per se* unlawful vertical price-fixing *conspiracy* be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?" Brief of Petitioner Monsanto Company at page i, *Monsanto Company v. Spray-Rite Service Corporation*, 465 U.S. 752 (1984), (emphasis added). The Spray-Rite brief did not address the merits of the question as to the standard of proof of a conspiracy. Nor did it discuss combinations. It did not even cite *Colgate*. Brief of Respondent Spray-Rite Service Corporation, *Monsanto Company v. Spray-Rite Service Corporation*, *supra*. The issue stated by this Court in *Monsanto* reads: "This case presents a question as to the standard of proof required to

find a vertical price-fixing *conspiracy* in violation of §1 of the Sherman Act." 465 U.S. at 755 (emphasis added).[1]

Perhaps, because of the way the standard of proof question was presented to and stated by this Court, *Monsanto* lapsed for a moment into the previously repudiated treatment of a Sherman Act §1 combination as entailing an agreement or conspiracy. The Court recited question 1 of the verdict which related to a "conspiracy or combination", 465 U.S. at 758 note 2, but summarized the verdict

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[1]In this case, Isaksen presented to the court of appeals the question: "Is there sufficient evidence in the record to support each of the following answers of the jury to the following questions?", the first of which reads: "Did the defendant contract, combine or conspire with any of its dealers to set the retail price of Vermont Castings' stoves?" Isaksen argued to the court of appeals that *Parke, Davis, Beech-Nut* and *Eastern States R.L.D. Asso.* each held that an agreement is not a necessary part of a combination and that price setting achieved by coercion violated the Sherman Act, citing also the court of appeals decisions referred to above. *See*, Brief for Appellant, Greggar S. Isaksen at 1, 23-32. *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987). On the other hand, the Vermont Castings' brief in the court of appeals attempted to restate the issue only in the terms of a conspiracy, saying: "Did the trial court correctly conclude that there was insufficient evidence to sustain the jury's finding of a vertical price-fixing *conspiracy* in violation of section one of the Sherman Act, 15 U.S.C. §1?" (Emphasis added). Brief of Defendant-Appellee, Vermont Castings, Inc. at 1, *Isaksen v. Vermont Castings, Inc., supra.* And the court of appeals, reverting to the repudiated decision of *Colgate* which limited the term "combination" to situations where there is an "agreement", held that "there is insufficient evidence to justify an inference of *agreement* between Vermont Castings and its other dealers". Pet. App. p. 4a (emphasis added). And the court of appeals further stated that "[w]ith a *conspiracy* between Vermont Castings and its other dealers ruled out, the harassment of Isaksen could be actionable under section 1 of the Sherman Act only if it succeeded in getting him to *agree* to raise his prices." Pet. App. p. 5a (emphasis added). In the Vermont Castings Petition for Writ of Certiorari in this case #87-728 at i there is again an effort, as was true by the petitioner in *Monsanto*, to have this Court rule only in the terms of an agreement or a conspiracy.

as finding that the termination was pursuant to a "conspiracy". 465 U.S. at 757-758. "A conspiracy is constituted by an agreement. . . ." *United States v. Kissel*, 218 U.S. 601, 608 (1910), per Justice Holmes for the Court. But the short hand statement of the Court in *Monsanto* surely was not a deliberate reinstatement of the repudiated *Colgate* decision that an agreement is a necessary part of a combination as that term is used in the Sherman Act.

Monsanto did not hold that an agreement was necessary for a combination. *Monsanto* did not answer any question with respect to a combination. It did not hold that the Sherman Act permits a combination in restraint of trade achieved by coercion. If there were any such holding in *Monsanto*, it would have been unnecessary to the decision and would have been contrary to the decisions of this Court dating back as early as *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 438 (1911) and should be withdrawn.[2]

Monsanto did *not* reinstate the *Colgate* dictum as claimed at page 11 of the Vermont Castings petition. The nuance, "[u]nder *Colgate*", in the following quotation is missed:

> Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor

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[2]We need not here attempt to disagree with the idea expressed in the form of a rule in *Monsanto* that a mere complaint by one person and subsequent action by another person are not, alone, sufficient evidence to support a finding that the two *agreed* upon the action. We note, however, that serious concern with that *Monsanto* pronouncement is being expressed in Congress in the form of the Freedom from Vertical Price Fixing Act of 1987 (H.R. 585) which has been approved by the House of Representatives Judiciary Committee's Monopolies and Commercial Law Subcommittee and S. 430 which has been approved by the Senate Judiciary Committee. See 53 Antitrust & Trade Reg. Rep. (BNA) 598 (Oct. 15, 1987).

> is free to acquiesce in the manufacturer's demand in order to avoid termination. 465 U.S. at 761.

The "[u]nder *Colgate*" sentences, instead of being a flat statement, are merely a reference to a prior dictum which may or may not have vitality. *Id.*

The "[u]nder *Colgate*" sentences state that a distributor is "free" to acquiesce in the price demands of the manufacturer in order to avoid termination. *Id.* The validity of this point was *not decided* in *Colgate* and it was *not decided* in *Monsanto.* It was rejected in *Beech-Nut*, *Parke*, *Davis* and *Simpson.*

The statement is internally inconsistent. A man is not "free" to give up his purse under a threat to his life. A man is not "free" to let someone else run part of his business under a threat of an entire loss of his business.

The court of appeals, below, recognized that in "a realistic sense" the *Colgate dictum* would permit coerced price setting. Pet. App. p. 8a. Counsel[3] for Vermont Castings acknowledge as much at page 11 of their Petition by admitting that under the *Colgate* arrangement "some dealers may have unwillingly agreed to charge suggested prices under the coercive threat of termination."

The *Colgate* dictum does not stand up against the holding of this Court in *Gompers*, 76 years ago, reiterated in *Eastern States R.L.D. Asso.* three years later, that the Sherman Act forecloses restraint of commerce by "coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter." *Gompers*, 221 U.S. at 438; *Eastern States*, 234 U.S. at 611. It does not stand up against the holding in

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[3]The Vermont Castings, Inc. brief in the court of appeals below disclosed that in addition to its Madison, Wisconsin counsel it is represented by the firm of Goodwin, Proctor and Hoar which is located in Boston, Massachusetts.

Simpson, 23 years ago, that "it matters not what the coercive device is." 377 U.S. at 17.

The *Colgate* dictum may have been influenced by the argument of counsel in that case that there can be no combination unless it is voluntary. *See*, Isaksen Petition for Writ of Certiorari at 21-22. This idea, however, has long ago been repudiated. *See*, *supra*, part II.

The dictum fails to take into account the statement of Congressman Culberson who was in charge of the bill for the Sherman Act in the House of Representatives that the reason a hypothetical contract between a manufacturer and a retailer governing prices offended the Sherman Act was that *"[t]he customers of the manufacturer are not allowed to sell at a lower rate than that fixed by the manufacturer." Isaksen Petition* at 20. (Emphasis added).

The *Colgate* dictum was wrong. It was not necessary for the actual (erroneous) decision in *Colgate* that a combination must be based on agreement.

We submit that the reference to the *Colgate* dictum in *Monsanto* was not necessary for the *Monsanto* decision or even for determination of the standard of proof announced by *Monsanto*. The *Colgate* dictum serves only as a scarecrow to be inadvertently picked up on occasion whenever time is not taken by counsel[4] and the Court to analyze the

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[4]*Colgate* was not even cited by the Spray-Rite brief and only in footnote 34 in the Monsanto principal brief submitted to this Court in the *Monsanto* case, and the footnote was appended to the statement in the brief that "manufacturers terminate distributors in the ordinary course of business for a host of independent reasons." Brief of Petitioner Monsanto Company at 34, *Monsanto*. In the brief of the United States as amicus curiae in *Monsanto*, the *Colgate* case was cited only in support of the proposition that a manufacturer's independent decision "about the pricing and distribution" of his product does not violate the Sherman Act. Brief for the United States as Amicus Curiae at 7, *Monsanto*. And in the reply brief of Monsanto, *Colgate* was cited, only with *Parke, Davis*, in connection with the assertion that motive for termination of a distributor is not material. Reply Brief of Petitioner Monsanto Company at 18, *Monsanto*. Yet it is on the basis of the *Monsanto*

place of *Colgate* in judicial history. The actual *decision* in *Colgate* equating a combination with an agreement has been repeatedly repudiated. Similarly, the *Colgate dictum*, which was impliedly repudiated in *Beech-Nut*, *Parke*, *Davis* and *Simpson*, should be expressly disavowed.

Summarizing, we respectfully submit that there is no basis for the Vermont Castings position that there must be a communication from the coerced party to the coercing party that the first is going to do what he is being coerced to do.

We pointed out in the Isaksen Petition for Writ of Certiorari, #87-610, that this matter is not a mere vertical price-fixing case. It is a horizontal case as well, involving elements of conspiracy and of a combination entailing coercion by one of many retail competitors which had economic control over the others, i.e. Vermont Castings, Inc., whereby a price structure has been adhered to in Wisconsin and throughout the country. Isaksen did not adhere to the structure, except for a period of four months, and was harassed and punished by the competitor that had the economic control with the cooperation of at least one other retail competitor.

Perhaps it was because the court of appeals below made the *Colgate* mistake of equating a combination with an agreement that it did not address the combinations. But they clearly existed in violation of §1 of the Sherman Act.

IV. Conclusion

In conclusion we respectfully submit that the Vermont Castings, Inc. Petition for Writ of Certiorari in this matter

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dictum that it is now strenuously argued that the *Colgate* dictum has been "decisively" resurrected by this Court. *See*, the Vermont Castings, Inc. Petition at ll-12. Vermont Castings, Inc. is wrong. This Court did *not decide* anything with respect to *Colgate* in *Monsanto*.

should be granted only if this Court grants certiorari in the Isaksen Petition in case #87-610; otherwise we respectfully submit that it should be denied.

Respectfully submitted,

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